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No. 627

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRANK E. MONDAY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. 9) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 3, 1959. A timely motion for rehearing was denied on October 7, 1959. The petition for a writ of certiorari was filed on January 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether petitioner's claim, asserted in a suit for back pay, that his removal from a position in the classified civil service was procedurally defective was correctly held to be barred by petitioner's failure to take a timely appeal of his dismissal to the Civil Service Commission.

2. Whether the written decision of the Department of the Air Force, notifying petitioner of his dismissal from employment with that agency, complied with the requirements of the Lloyd-La Follette Act of 1912, Sec. 6, 37 Stat. 555, as amended, 62 Stat. 354, and with Civil Service Regulations.

3. Whether the court below had basis for finding that petitioner was permitted by the Air Force to examine all available documents pertinent to his dismissal.

STATUTES INVOLVED

The relevant statute and regulations are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

Petitioner was employed by the Department of the Air Force as a civilian employee, holding classified civil service status, from 1949 to 1956. By a letter dated February 21, 1956, the Air Force notified petitioner, who was then serving as an Air Intelligence Research Specialist, GS-7, that his work during the preceding six months had been deficient in quality and in quantity (D. Ex. 5). The letter, which was eight pages in length, set out in detail the deficiencies

with which petitioner was charged, and gave him seven days to reply to the charges (*ibid.*).

On February 23, 1956, petitioner answered the charges (D. Ex. 4). He was notified, by a letter of February 28, 1956, that his reply had been too general to be a sufficient answer (D. Ex. 3). He was told to prepare another reply and that, if he desired, documents on file would be made available to him (*ibid.*). On March 5, 1956, petitioner submitted his second reply to the charges (D. Ex. 2).

By a letter dated March 13, 1956, petitioner was notified that a final decision had been made to remove him from the service (D. Ex. 10). This letter referred specifically to the charges of inefficiency contained in the letter of February 21, and stated that, although petitioner's replies had been carefully considered, they were inadequate to rebut the charges which had been preferred (*ibid.*). Petitioner's separation for inefficiency became effective on March 16, 1956.

Petitioner appealed the removal action through Air Force procedures, and, on March 4, 1957, was notified of the Department of the Air Force's final decision to sustain his removal (D. Ex. 9).

Fifty days later, on April 23, 1957, petitioner filed an appeal with the Civil Service Commission on the ground that his dismissal had not been effected in compliance with the procedural requirements of the Lloyd-La Follette Act (D. Ex. 11). The Appeals Examining Office of the Commission refused to consider the appeal, holding it barred by laches (D. Ex. 12). The Commission noted that, under its regu-

lations, the requirement that appeals be filed ten days after the effective date of separation might be waived upon a showing by the appellant that circumstances beyond his control prevented him from filing a timely appeal. But it stated that, even assuming that the agency's failure to notify petitioner of the time limit for appeal to the Commission was a circumstance beyond petitioner's control, it was not such as would excuse his extensive delay in acquainting himself with the Commission's regulations and filing an appeal (*ibid.*). This refusal to entertain the appeal was affirmed by the Board of Appeals and Review of the Civil Service Commission (D. Ex. 14).

Petitioner thereupon brought this suit in the Court of Claims to recover back pay from the date of his dismissal, which, he alleged, had been unlawful and arbitrary. On June 3, 1959, the court granted respondent's motion for summary judgment. It held that petitioner's dismissal had not been arbitrary and that there had been full compliance with procedural requirements. The court noted further that, in any event, petitioner's complaints could not be judicially reviewed because he had failed to pursue seasonably the administrative remedy provided him. On October 7, 1959, petitioner's motion for rehearing was denied.

ARGUMENT

Petitioner has presented no question of general importance which would warrant review by this Court. His sole complaint is that, under the circumstances of this case, his dismissal was invalid and

that he is, therefore, entitled to recover his back pay. This contention cannot be considered because petitioner failed to make timely application for the appropriate administrative remedy. In any event, as the court below held, petitioner's dismissal was in accordance with Lloyd-La Follette procedures.

1. Petitioner filed a request with the Civil Service Commission for investigation of his removal more than one year after the date of his separation and fifty days after the final decision of the Air Force. The Commission refused to waive its ten-day limitation [1] stating that "due diligence on Mr. Monday's part would require that he had long since discovered the requirements of the Commission's regulations for himself and filed an appeal before this late date" (D. Ex. 12).

Petitioner urges that the Commission's action was based on an erroneous belief that the time for seeking its review began to run on March 16, 1956, the date of separation, rather than March 4, 1957, the date of the final agency action. This contention is not supported by the record. From the Commission's letter denying him review (D. Ex. 12) it is clear that

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[1] 5 C.F.R. 9.105(b)(3) (1949 ed.) (App. 10-11) of the Civil Service Commission's regulations, which was in effect at the time of petitioner's separation, provided that the Commission would not investigate an employee's removal unless the request for such an investigation was received by the Commission within ten days from the effective date of separation. This time limit might be extended in the discretion of the Commission upon a showing by the employee that circumstances beyond his control prevented him from filing within the prescribed ten days.

petitioner's delay was considered inexcusable whether the ten day period commenced to run on the former or the latter date. The Commission obviously deemed it unnecessary to determine that question since, in all events, there was no justification for the fifty-day delay following the final agency action.

Inasmuch as petitioner failed to exhaust his administrative remedies by filing a timely appeal with the Civil Service Commission, he cannot now challenge the validity of his dismissal in a suit for back pay in the Court of Claims. *Bodson* v. *United States*, 141 C. Cls. 532, 536; *Henry* v. *United States*, 139 C. Cls. 362, 366; cf. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41.

2. Under the Lloyd-La Follette Act of 1912, as amended, and Civil Service Regulations, a person in the classified civil service of the United States cannot be removed without being accorded, *inter alia*, a written decision by the employing agency, stating the reasons for his dismissal. 37 Stat. 555, 62 Stat. 354, 5 U.S.C. 652(a) (App. 9); 5 C.F.R. 9.102(a)(1) (1949 ed.) (App. 9-10).

Petitioner's contention that the Air Force's letter of decision, dated March 13, 1956, did not adequately indicate the basis for his dismissal is untenable. The charges against petitioner alleged that his work had been deficient in both quantity and quality for a period of six months. The agency was not required, as petitioner claims, to make a finding in its decision with respect to each of the numerous instances of inefficiency attributed to petitioner. In *Green* v. *Baughman*, 243 F. 2d 610 (C.A.D.C.), certiorari

denied, 355 U.S. 819, it was held that, where the charges preferred against an employee are sufficiently specific, a letter of decision stating simply that the charges brought against him have been sustained is adequate.[2] This rule is obviously reasonable and it is fully applicable here. The agency's letter of decision made it unequivocally clear that the charges of continuing inefficiency had not been satisfactorily met by petitioner, and that they constituted the grounds for his dismissal (D. Ex. 10).

3. Petitioner contends also that the Air Force denied him access to some of the documents which he allegedly had processed inefficiently and that this constituted a violation of his rights under the Fifth Amendment. The record shows, however, contrary to petitioner's assertion, that he was permitted to make a full examination of all of the pertinent available documents. The Air Force's letter of February 28, 1956, advised petitioner that the documents on file would be made available to him (D. Ex. 3). Indeed, petitioner's thirteen-page answer to the charges demonstrates that he examined the documents upon which the charges were predicated (D. Ex. 2). There is thus firm support for the finding

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[2] An earlier decision of the District of Columbia Circuit upon which petitioner relies, *Mulligan* v. *Andrews*, 211 F. 2d 28 (C.A.D.C.), is not apposite. It was there held that a letter of decision asserting merely "unsuitability" as the basis for dismissal did not meet the requirements of the statute. Nor is the case at bar like *Kutcher* v. *Higley*, 235 F. 2d 505 (C.A.D.C.), where it appeared from the agency's decision that the employee was dismissed on grounds other than those stated in the charges against him.

of the court below that "[a]ccess to all pertinent records was granted [petitioner] and ample opportunity to prepare his replies, even during working hours. Indeed, until this suit the availability of all desired records was unquestioned" (Pet. 11).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1960.

APPENDIX

The Lloyd-La Follette Act of 1912, Sec. 6, 37 Stat. 555, as amended, 62 Stat. 354, 5 U.S.C. 652(a) provides, in pertinent part:

> (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. * * *.

5 C.F.R. 9.102(a)(1) (1949 ed.) provides, in pertinent part:

> No employee, veteran or nonveteran, shall be separated, suspended, or demoted except for such

cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified in the decision of the reasons for the action taken and its effective date. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or other action, shall be made a part of the records of the department or agency concerned.

5 C.F.R. 9.105 (1949 ed.) provides:

(a) Except as required by section 14 of the Veterans' Preference Act, the Commission shall not investigate or review the sufficiency of the reasons for removal, suspension, reassignment, or demotion of an employee.

(b) The Commission may investigate the removal, suspension, reassignment, or demotion of an employee when such employee establishes a prima facie case that:

(1) The procedure prescribed by the Commission under § 9.102 (a) (1) has not been followed; or

(2) The removal, suspension, reassignment, or demotion was made for political reasons, except as may be required by law, or for religious reasons, or resulted from discrimination because of marital status or race.

(3) No case will be investigated under this paragraph unless the request for such investigation is received by the Commission within ten (10) days from the effective date of separation, suspension, reassignment, or demotion. This time limit may be extended in the discretion of the Commission only upon a showing by the employee that circumstances beyond his control prevented him from filing a request for an investigation within the prescribed ten (10) days. The regulations of the Commission under section 14 of the Veterans' Preference Act of 1944 (Part 22 of this chapter), relating to appeals to the Commission of preference eligibles, are applicable whenever a request is received from a preference eligible to investigate a removal, suspension for more than thirty (30) days, or demotion.

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